

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MONEY MAILER, LLC,
Plaintiff,
v.
WADE G. BREWER.,
Defendant

Cause No. C15-1215RSL

ORDER DENYING BREWER'S MOTION FOR ATTORNEY'S FEES

This matter comes before the Court on “Wade Brewer’s Petition for Reasonable Attorneys’ Fees, Expenses, and Costs.” Dkt. # 316. Money Mailer filed this lawsuit in 2015 seeking payments allegedly due and owing under its franchise agreement with Brewer. In order to defend himself against those claims, Brewer attempted to invalidate the franchise agreement by arguing that it violated the Franchise Investment Protection Act and the Consumer Protection Act. In addition, Brewer asserted a number of additional counterclaims sounding in tort and contract.¹ Each party successfully defended against the other’s claims. Brewer’s thirteen counterclaims were abandoned and/or dismissed on summary judgment. Money Mailer’s breach

¹ Brewer asserted non-statutory claims for declaratory judgment; breach of the purchase agreement; conversion; breach of a March 2013 agreement; breach of the franchise agreement; breach of a consulting fee agreement; intentional misrepresentation; negligent misrepresentation; civil conspiracy; aiding and abetting; unjust enrichment; and breach of the duty of good faith and fair dealing.

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1 of contract and moneys due and owing claims were voluntarily withdrawn when the Court found
2 that Money Mailer no longer held the right to pursue the claims it had asserted in this action and
3 the transferee opted not to appear. The Court ordered that, after five years of litigation, Money
4 Mailer's claims would be dismissed with prejudice.
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6 Brewer seeks an award of attorney's fees and costs under a provision of the franchise
7 agreement which states:

8 16.4 Attorneys' Fees. If either party commences any action or proceeding related
9 to this Agreement, then the prevailing party will be reimbursed by the losing party
10 for all costs and expenses incurred in connection with the action, including . . .
11 reasonable attorneys' fees (including reasonable reimbursement for in-house
12 attorneys).

13 Dkt. # 268 at 21. Brewer argues that he is entitled to \$820,417.50 in attorney's fees and
14 \$72,438.21 in costs/expenses under this provision.

15 The primary issue raised by Brewer's motion is whether Brewer can be considered the
16 prevailing party "In general, a prevailing party is one who receives an affirmative judgment in its
17 favor." *Marassi v. Lau*, Wn. App. 912, 915 (1993), overruled on other grounds by *Wachoria*
18 *SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 490-92 (2009), (citing *Schmidt v. Cornerstone Invs.,*
19 *Inc.*, 115 Wn.2d 148, 164 (1990)). "If neither wholly prevails, then the determination of who is a
20 prevailing party depends upon who is the substantially prevailing party, and this question
21 depends upon the extent of the relief afforded the parties." *Riss v. Angel*, 131 Wn.2d 612, 633
22 (1997). If "both parties have prevailed on major issues, neither qualifies as the prevailing party
23 under the contract." *Am. Nursery Prod., Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 234-35
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1 (1990).²

2 As a preliminary matter, the Court agrees with Brewer that his counterclaims arose out of
 3 and are related to the franchise agreement for purposes of the attorney's fee provision. *Seattle*
 4 *First Nat. Bank v. Washington Ins. Guar. Ass'n*, 116 Wn.2d 398, 413 (1991) ("[A]n action is on
 5 a contract if the action arose out of the contract and if the contract is central to the dispute.").
 6 The Court therefore considers all of the claims and counterclaims at issue when determining
 7 whether Brewer obtained affirmative relief and/or substantially prevailed. He did not. Of the
 8 fifteen causes of action at issue, Brewer prevailed on only two. He obtained none of the
 9 affirmative relief he requested, nor did he defeat Money Mailer's claims on the merits. While he
 10 was not held liable for breach of contract, he did not substantively prevail on those claims,
 11 either. Rather, Money Mailer's breach of contract and moneys due and owing claims were
 12 dismissed because it had transferred the right to pursue the claims and the transferee abandoned
 13 the claims. In these circumstances, Brewer does not qualify as a prevailing party under
 14 Washington law.

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22 After reviewing the case law described in the text, Division 1 of the Washington Court of
 23 Appeals found that the general principles did not fairly address situations where a defendant has not
 24 made a counterclaim for affirmative relief (and therefore could not obtain an affirmative judgment in his
 25 or her favor), but successfully defended a number of distinct and severable claims put forth by the
 26 plaintiff. *Marassi*, 71 Wn. App. at 915-17. The Court declines to apply *Marassi*'s proportional approach
 27 in this litigation: Brewer asserted counterclaims, but did not prevail on any of them or obtain the
 28 affirmative relief requested. The Washington Supreme Court's general prevailing party principles
 therefore apply.

1 For all of the foregoing reasons, Brewer's motion for attorney's fees (Dkt. # 316) is
2 DENIED.
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5 Dated this 12th day of April, 2021.
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7 Robert S. Lasnik
United States District Judge
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